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In the Supreme Court of the United States

OCTOBER TERM, 1978

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY,
PETITIONERS

v.

PPG INDUSTRIES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Administrator and Regional Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 587 F.2d 237. The final deci-

sion of the Administrator (App. F, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on January 8, 1979. A timely petition for rehearing was denied on February 26, 1979. On May 23, 1979, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including June 26, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals has original jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. 7607(b)(1), to review a final action by the Administrator applying new-source performance standards to certain power generating facilities.

STATUTES INVOLVED

Section 307(b)(1) of the Clean Air Act, as amended by the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 776 (to be codified at 42 U.S.C. 7607(b)(1)), provides in pertinent part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under

> regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.

STATEMENT

1. Section 111 of the Clean Air Act directs the Administrator of EPA to set standards of emissions performance for all "new sources" of air pollution. 42 U.S.C. 7411. A "new source" is defined as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C. 7411(a)(2). The Administrator is directed to publish, from time to time, a list of stationary sources which he determines may contribute significantly to air pollution endangering the public health or welfare, and thereafter to publish standards of performance for new sources in each category. 42 U.S.C. 7411(b)(1)(A).

On March 31, 1971, the Administrator published an initial list of stationary sources that included "fossil fuel-fired steam generators." 36 Fed. Reg. 5931 (1971). Later that year, regulations for this category were published and became effective on August 17, 1971. See 40 C.F.R. 60.1-60.15 and 60.40-60.46. The regulations set effluent limitations, depending on the heat generating capac-

ity of the new source. 40 C.F.R. 60.42-60.45. The regulations provide that any owner or operator may apply to the Administrator for a determination of whether action taken or intended to be taken by the owner or operator constitutes "construction" subject to the act and the regulations. 40 C.F.R. 60.5. Section 307(b)(1), 42 U.S.C. 7607(b)(1), provides that a petition for review of "any" "final action" of the Administrator may be filed only in the court of appeals. See generally *Train* v. *NRDC*, 421 U.S. 60 (1975).

2. PPG Industries, Inc., a chemical manufacturing corporation, constructed a new power facility in Louisiana utilizing a coordinated system of two gas turbine generators combined with two "waste heat" boilers.[1] The turbines and boilers are fossil-fuel fired (App. E, *infra*). EPA informed the company in October 1976 that the new-source performance standards for stationary sources (NSPS), 40 C.F.R. 60.40, applied to the waste-heat boilers (App. C, *infra*). In April 1977 PPG submitted a request for a determination under 40 C.F.R. 60.5 that construction of the waste heat boilers commenced prior to the effective date of the regulation (so that the boilers were not "new sources"), or, in the alternative, a determination that the NSPS regulations are inapplicable altogether to "waste-heat" boilers (App. E, *infra*). EPA determined, however, by letter of June 8, 1977,

[1] The gas turbines produce electricity. The "waste heat" boilers utilize the exhaust heat from the gas turbines and the combustion of additional fossil fuels to produce steam for use in PPG's chemical processing.

that the two boilers were new sources subject to the regulations (App. F, *infra*). On August 18, 1977, EPA clarified its decision and required PPG to install continuous in-stack opacity monitors (App. G, *infra*).

3. On October 4, 1978, PPG filed a petition for judicial review of this determination in the court of appeals. Shortly thereafter, PPG also filed a complaint against petitioners in the United States District Court for the Western District of Louisiana for an injunction and a declaratory judgment invalidating the agency's ruling. *PPG Industries* v. *Costle*, Civ. Action No. 77-1271 (W.D. La.). PPG then challenged the jurisdiction of the court of appeals to review EPA's determination. EPA contended that every "final action" of the Agency, including the determination in this case, is reviewable exclusively by the court of appeals under Section 307(b)(1). The Fifth Circuit disagreed, holding that "any other final action" in Section 307(b)(1) did not include EPA's determination. The court did not reach the merits.

The court based its jurisdictional holding on three arguments. First, the court noted that prior to the 1977 amendment to Section 307(b), "the district courts and not the courts of appeals had jurisdiction [under 28 U.S.C. 1331] to review determinations of [such] local applications * * *" (App. A, *infra*, 11a).[2] Although the 1977 amendment added the

[2] Prior to amendment, Section 307(b)(1), 42 U.S.C. 1857h-5(b)(1), provided:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111

phrase "any other final action" to the statutory list of items to be reviewed by the courts of appeals, the court thought that it was "most revealing" that the legislative history of this amendment made no reference to any "massive shift of jurisdiction to the courts of appeals" (*id.* at 15a). This silence suggested to the court that Congress did not really mean to shift review of numerous "local determinations" by EPA to the court of appeals. Second, pointing out that the administrative record here consists exclusively of correspondence, the court stated that an administrative determination based on "a skeletal record" should be reviewed by the district court in the first instance so that "[t]he discovery apparatus of district courts" could permit "fact and record development." Congress, the Fifth Circuit noted (*id.* at 20a-21a), must have inserted "any other final action" into Section 307(b)(1) with the "mechanical

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any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. *A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit.* Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day. [Emphasis added.]

limitations of the courts of appeals in mind." Finally, the court noted that Section 307(b)(1) specifically enumerates certain determinations for review in the court of appeals before adding the phrase "and any other final action." This enumeration, the court thought, would be redundant if "any other final action" literally comprehended *any* final action (App. A, *infra*, 15a). Therefore, the Fifth Circuit held that Section 307(b)(1)'s "any other final action" did not include a determination under 40 C.F.R. 60.5 that a specific facility is a new source.

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals is incorrect. Prior to the 1977 amendment, Section 307(b)(1) provided that certain specifically enumerated actions of nationwide consequence were reviewable in the District of Columbia Circuit and that analogous local actions were reviewable in the appropriate regional circuits. The amendment added to the list of actions reviewable exclusively in the District of Columbia Circuit the promulgation of any rule issued under Sections 113, 119 or 120, and "any other nationally applicable regulations *or final action* taken" under the Act. In parallel fashion, the amendment added to the list of EPA actions reviewable in the appropriate regional court of appeals the promulgation of any order under Sections 111(j), 112(c), 113(d), and 120, and "any other final action of the Administrator" under the Clean Air Act "which is locally or regionally applicable." Congress, therefore,

clearly meant to confine review of all "final actions" in the courts of appeals.

a. EPA's determination that PPG's boilers are subject to its new-source regulations is a "final action" within the meaning of Section 307(b).[3] First, short of an enforcement action, the agency has rendered its final word on the matter. PPG applied for a formal determination under 40 C.F.R. 60.5 concerning whether its facility is subject to the new-source regulations. After consideration of PPG's submissions, including a law memorandum, EPA determined that the facility is subject to the regulations. PPG's disagreement with that determination turns only on an interpretation of the new-source regulations and their application to undisputed facts. No further administrative appeals remain and, unless PPG honors EPA's ruling, it will be enforced through enforcement proceedings under Section 113, 42 U.S.C. 7413. Second, one of the purposes of pre-enforcement review is to permit prompt review of an agency's final decision before the applicant acts at its peril. That purpose would be served here. See generally *Abbott Laboratories* v. *Gardner*, 387 U.S.

[3] Section 307(b)(1) requires that petitions for review be filed within 60 days "from the date notice of such promulgation, approval or action appears in the Federal Register * * *." EPA has informed us that it has not routinely published in the Federal Register notice of actions such as the determination made in this case, but that it intends to begin doing so in the near future. (EPA did not publish the PPG determination). The only effect of this lapse would seem to be a tolling of the running of the 60-day limitation on review.

136, 148-156 (1967); *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 170-174 (1967); *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164-165 (1967).

Third, the EPA's determination in this case is akin to other types of actions specifically considered "final" under Section 307(b). For example, Section 307(b) makes "orders" under Section 112(c) reviewable only in the courts of appeals. Section 112(c) prohibits the construction of any new source which will, "in the Administrator's judgment" emit "hazardous air pollutants" for which the Administrator has set a standard unless, among other things, "the Administrator finds that such source if properly operated will not cause emissions in violation of such standard * * *."[4] An inquiry to the Administrator for his "judgment" whether a facility would emit hazardous air pollutants and, if so, for his determination that its proper

[4] Similarly, Section 307(b) permits review in the court of appeals of "any order under section 111(j)." Section 111(e) prohibits the operation of new sources in violation of the new-source standards. Section 111(j) allows "[a]ny person proposing to own or operate a new source" to "request the Administrator for one or more waivers" in order to "encourage the use of an innovative technological system or systems of continuous emission reduction." The Administrator may grant the request after a public hearing. He may deny it without a hearing. Such "orders" are reviewable under Section 307(b). Once again, a denial of such a request is akin to a denial of PPG's request for a determination that its facility is not subject to the new source regulations at all. The activity in question has not yet occurred but is known. It is important to the requesting party to have a final agency determination and judicial review of the determination before proceeding at its peril.

operation would meet the specified effluent levels, is very similar to PPG's request under 40 C.F.R. 60.5 for a determination that its proposed boilers would not be covered by the new-source regulations. In both cases, the new source is not yet operational but the pertinent facts are known. In both cases, no formal hearing is held. In both cases, the applicant has a legitimate need for a final resolution before it proceeds at its peril.

b. The Fifth Circuit's contrary view is not persuasive. The court was moved by the absence of any mention in the legislative history of a "massive shift" of jurisdiction to the court of appeals. But we cannot disregard the plain language of a statute merely because it is not repeated in the legislative history. Committee reports need not state what is already obvious. See *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). In fact, however, although the legislative evidence is meager, the House Report did state that the amendment "provides for essentially locally, statewide or regionally applicable rules or orders to be reviewed in the United States Court of Appeals for the circuit in which such locality, state or region is located." H.R. Rep. No. 294, 95th Cong., 1st Sess. 323 (1977). By contrast, there is no mention of judicial review in the district courts. Moreover, although the number of actions comprehended by "any other final action" is substantial (see note 8, *infra*), it would not seem so "massive" that it ineluctably would have provoked comment in the legislative history.

The court's second point is that Congress could not have intended to require review of such determinations in appellate courts which lack the procedural means to supplement thin records. The size of an administrative record, however, is not determinative of jurisdiction. The Court has firmly established that a reviewing court can look only to the record created by the agency. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973). A court's capacity to conduct discovery, therefore, is irrelevant to its authority to review administrative action. Where the record is lacking, the remedy is remand to the agency for further consideration.[5] *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971). The Fifth Circuit's opinion invites the district court to go far beyond the administrative record and to create a judicial record much broader than the administrative proceedings.[6] Whether the district or appellate court

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[5] *Save the Bay, Inc.* v. *Administrator*, 556 F. 2d 1282 (5th Cir. 1977), cited by the court, is distinguishable. *Save the Bay, Inc.* involved a challenge to EPA's *inaction* in failing to veto a state-issued permit. Jurisdiction in *Save the Bay* was dependent upon an EPA issuance or denial of a permit. Because EPA had neither issued nor denied the permit, the court found it lacked jurisdiction. The reason the record in that case was sparse was because EPA had not done anything. By contrast, EPA has acted to apply certain regulations to PPG's facility, and the record of that action is set forth in the exchange of correspondence.

[6] The subsequent proceedings in *Overton Park* demonstrate this danger. Although the district court was allowed on remand to make a limited inquiry into factors influencing the

has original jurisdiction, however, the remedy for an incomplete administrative record is the same—remand to the Agency.

Equally flawed is the court's rationale that the specifically enumerated actions in Section 307(b) would be superfluous if "any other final action" really comprehended all final actions. Congress was amending a previous provision that allowed review of specifically enumerated items. Simply substituting "any final action" might well have left a doubt whether Congress intended to discontinue review in the court of appeals of the old list of specifically enumerated items. This drafting problem was conveniently solved by leaving the old list intact and adding the phrase "any *other* final action." The word "other" eliminates any overlap with the specifically enumerated items. In any event, it is hardly a novel legislative technique to indulge in some redundancy out of abundance of caution.[7] Even when intending to reach all like actions, it is not unusual to find certain actions specifically named.

2. The decision imposes a severe burden on the administration of the Clean Air Act. Except for the

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administrator's decision, the district court conducted a 25-day, evidentiary trial with substantial probing into the administrative procedure. *Citizens to Preserve Overton Park* v. *Volpe*, 335 F. Supp. 873, 878 (D.C. Tenn. 1972).

[7] The practice dates at least from the re-issue of Magna Carta in 1225 in the reign of Henry III. Chapter 23 of that charter (reprinted in 6 *Halbury's Statutes of England* 404 (3d. ed. 1969)), provides:

> All Wears from henceforth shall be utterly put down by Thames and Medway, and through all England, [except] only by the sea-coasts.

specifically enumerated items, the decision leaves jurisdiction to review EPA action entirely to chance. The size and quality of the administrative record determines the appropriate forum. This was very recently illustrated in another Fifth Circuit decision, *United States Steel Corporation* v. *EPA*, No. 78-1922 (May 3, 1979). In that case, the Fifth Circuit accepted jurisdiction under Section 307(b)(1) over EPA's promulgation of regulations because that action was "based on a substantial record." The *United States Steel* court reaffirmed *PPG*'s holding that under Section 307(b)(1) "some actions will be reviewable only in the district courts" because those actions were "made without the development of a full record" (slip op. 6).

This criterion creates serious problems. Many cases will fall within the newly created "twilight zone." [8] In the future, parties may seek to reduce (or enlarge) the size of the administrative record in

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[8] There are approximately 90 actions now pending against EPA (of which four are in the Fifth Circuit) which depend on the meaning of "any other final action" to determine proper jurisdiction. The majority of the cases are actions seeking review of either non-attainment area designations by EPA under Section 107 or of EPA regulations or permits relating to the prevention of significant deterioration under Section 165. Other cases include a challenge to an EPA order under Section 207(c) to recall automobiles not complying with the carbon-monoxide standard and a challenge to EPA guidance to states for control techniques for sources of volatile organic compounds. In at least two instances, other than the present case, simultaneous proceedings to review EPA actions have been filed in the district courts and the courts of appeals.

order to obtain review the district court (or the court of appeals). Uncertain as to the correct court, petitioners will file precautionary actions in both the district court and the court of appeals. In many instances, burdensome discovery will be conducted in the district courts. Jurisdiction will be a hotly contested issue in every case no matter where it is filed. At all events, the decision below destroys the clear-cut scheme of review established by Congress under which all pre-enforcement review is in the court of appeals and all enforcement actions are in the district courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1979

APPENDIX A

No. 77-2989

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

PPG INDUSTRIES, INC., PETITIONER

v.

ADLENE HARRISON, REGIONAL ADMINISTRATOR, and DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS

Jan. 8, 1979

Petition for Review of an Order of the Environmental Protection Agency.

Before RONEY, TJOFLAT and HILL, Circuit Judges.

RONEY, Circuit Judge:

In this case PPG Industries, Inc. appeals an action of the Administrator of the Environmental Protection Agency (EPA) subjecting the "waste heat" boilers of its recently constructed power plant to new source performance standards for fossil fuel-fired steam generating units. 40 C.F.R. §§ 60.40-46 (1977). PPG first challenges this Court's jurisdiction to entertain the appeal, having filed its petition for review both here and in the district court because of jurisdictional uncertainty. On the merits PPG

contends that the performance standards for fossil fuel-fired steam generators have no application to its waste heat boilers, which are fueled only partially by fossil fuels. Even if the standards apply, PPG argues, the final action taken by the Administrator here was without statutory authority for two reasons: first, having started construction before the effective date of the regulations, the waste heat boilers were not a "new source" to which the statute applied; second, the Administrator had authority only to set standards for emission limitations, whereas here a standard for source fuel was imposed. In any event, PPG asserts the Administrator's action was arbitrary and capricious. Finding this Court lacks jurisdiction, we dismiss the petition.

I. *PPG's Lake Charles Facility*

Petitioner PPG Industries, Inc. owns and operates a chemical manufacturing plant located at Lake Charles, Louisiana, which requires large amounts of steam and electricity for its operations. To meet its energy requirements, PPG recently constructed a power plant designed to take advantage of fuel-efficient "cogeneration" technology. The power plant is comprised of two similar units. In each unit fossil fuel is burned in a General Electric gas turbine generator to produce electricity. Energy, or "waste heat" thrown off by the turbine's exhaust, which would normally be discharged into the atmosphere, is funnelled as a heat source into a "waste heat" boiler which also burns fuel oil. This exhaust from the

turbines contributes nearly 40% (approximately 371 million British thermal units per hour) of the total input to the waste heat boiler, while the remaining heat (approximately 598 million British thermal units per hour) is provided by combustion of fuel oil or natural gas, known as fossil fuels. The highly pressurized steam produced by the waste heat boiler is first used to turn a "backpressure" turbogenerator, thereby creating more electricity, and is then channelled into PPG's main plant for use in the manufacturing process.

The air pollutants from PPG's power plant are similar to those of any other boiler fired by fuel oil. The pollutant of principal concern is sulfur dioxide, which is formed during combustion of sulfur-bearing fuels in the presence of oxygen. Virtually all of the sulfur dioxide emissions from the power plant are directly attributable to the combustion of fuel oil in the waste heat boiler and virtually none to the gas turbine exhausts.

PPG can control its sulfur dioxide emissions through use of either flue gas desulfurization equipment ("scrubbers") or fuel oil with a low sulfur content. In addition to sulfur dioxide emissions, PPG's power plan will emit particulate matter and nitrogen oxides. These pollutants are not of great concern in this case because nitrogen oxides are controlled primarily through boiler design, and combustion of fuel oil does not produce significant particulate emissions.

II. *The Statutory and Regulatory Framework*

In passing the Clean Air Act Amendments of 1970, Congress for the first time established a comprehensive federal-state scheme for the control and abatement of air pollution. Pub.L. No. 91-604, 84 Stat. 1676 (December 31, 1970), *codified at* 42 U.S.C. § 1857 (1970). The Clean Air Act was again substantially amended in 1977, Pub.L. No. 95-95, 91 Stat. 685 (August 7, 1977), and the final amended version is codified at 42 U.S.C. § 7401-7642.[1]

The 1970 Amendments required the EPA Administrator to set national ambient air quality standards for "criteria" pollutants.[2] Each state, in turn, was required to adopt and submit for EPA approval a plan providing for "implementation, maintenance, and enforcement" of the national standards within the given state. 42 U.S.C.A. § 7410.

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[1] The history and structure of the 1970 Amendments are discussed in *Train* v. *National Resources Defense Council, Inc.*, 421 U.S. 60, 63-67, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975).

[2] 42 U.S.C. §§ 1857c-3, 1857c-4 (1970), *as amended* 42 U.S.C.A. §§ 7408, 7409.

National ambient air quality standards are of two types. "Primary" standards are those which, in the Administrator's judgment, are "requisite to protect the public health." "Secondary" standards are "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [a criteria] air pollutant in the ambient air." 42 U.S.C.A. § 7409(b)(1) and (2).

Standards have been set for six "criteria" pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4-.11 (1977).

While emissions from both existing and new sources of pollution are regulated under the various state implementation plans, Congress, "concerned that new plants—new sources of pollution—would have to be controlled to the greatest degree practicable if the national goal of a cleaner environment was to be achieved," *Essex Chem. Corp.* v. *Ruckelshaus*, 158 U.S.App.D.C. 360, 486 F.2d 427, 434 n.14 (D.C.Cir. 1973), *cert. denied*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974), determined that all new sources should be subject to an additional layer of federal control. It therefore enacted § 111, which required the establishment of "standards of performance" for all new sources. 42 U.S.C. § 1857C-6 (1970), *as amended*, 42 U.S.C.A. § 7411. "New source" is defined under the Act as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." 42 U.S.C.A. § 7411(a)(2).

Under § 111(b), the Administrator was directed to publish, and from time to time revise, a list of those categories of stationary sources which he determined "may contribute significantly to air pollution which causes or contributes to endangerment of public health or welfare." Subsequently, he was to promulgate, after proposal and opportunity for public comment, standards of performance for new sources in the listed categories.

In accordance with this directive, the Administrator published an initial list of five stationary source categories on March 31, 1971. The listed sources were fossil fuel fired-steam generators, incinerators, portland cement plants, nitric acid plants, and sulfuric acid plants. Later that year, regulations establishing new source performance standards were proposed and promulgated for each of the listed categories of sources. Regulations of general applicability are grouped in Subpart A, 40 C.F.R. §§ 60.1-.15 (1977), while the regulations implementing the new source performance standards for fossil fuel-fired steam generators are located in Subpart D, 40 C.F.R. § 60.40-.46 (1977). The standards of performance are written as emission limitations (in pounds per million British thermal units heat input or grams per million calories) which may not be exceeded. *See* 40 C.F.R. §§ 60.42-.45 (1977).

The regulations define "fossil fuel-fired steam generating unit" and "fossil fuel" as follows:

> (a) "Fossil-fuel fired steam generating unit" means a furnace or boiler used in the process of burning fossil fuel for the purpose of producing steam by heat transfer.
>
> (b) "Fossil fuel" means natural gas, petroleum, coal, and any form of solid, liquid, or gaseous fuel derived from such materials for the purpose of creating useful heat.

Id. § 60.41. The Subpart D provisions are made applicable to "[e]ach fossil-fuel fired steam generating unit" of more than 250 million British thermal units per hour heat input. *Id.* § 60.40.

Each fossil fuel-fired steam generating unit must meet performance standards for particulate matter, sulfur dioxide, and nitrogen oxides. *Id.* §§ 60.42-.44. In order to measure compliance, § 60.45 provides that the source owner or operator must install, calibrate, maintain, and operate continuous monitoring systems for measuring the opacity of emissions, sulfur dioxide and nitrogen oxides emissions, and either oxygen or carbon dioxide in the flue gases.

III. *Agency and Court Proceedings*

As a result of correspondence in 1975 and 1976 with PPG and intervenor Continental Oil Company (Continental), EPA learned of the construction of the new power plant at PPG's Lake Charles facility. In response to an EPA inquiry, PPG informed the agency that it planned to start construction of the two waste heat boilers on January 1, 1976, and July 1, 1977. EPA promptly requested information regarding the construction of the power plant to determine whether it would be subject to new source performance standards promulgated under § 111 of the Clean Air Act.

In responses of May 14, 1976, and June 28, 1976, PPG provided detailed information on the design and construction of the new power plant, along with information regarding other power generating facilities at the Lake Charles works.

In a letter dated October 5, 1976, the Acting Director of the Enforcement Division of EPA's Region VI advised PPG that the performance standards for

fossil fuel-fired steam generating units would apply to the waste heat boilers of the power plant because in the Director's view the construction of the boilers was commenced after August 17, 1971, the date on which the Subpart D regulations were proposed. In particular, the Director noted that the final purchase order for the first of the two waste heat boilers was dated October 14, 1974.

PPG responded by a letter dated November 12, 1976, contending that each of the two sets of turbines and boilers in the power plant constituted a single integrated unit, that construction of each unit was commenced in 1970, and that the turbogenerator purchased in 1970 would be completely useless without the waste heat boilers. In a letter dated December 22, 1976, the Region VI Director answered that "[e]ven though [PPG] may have ordered equipment before the the date of the proposed regulations that would be completely useless without the steam generators, that action is irrelevant to determine the applicability of the regulations to the two steam generators."

On April 13, 1977, PPG filed a formal request under 40 C.F.R. § 60.5 (1977)[3] for an EPA determi-

[3] 40 C.F.R. § 60.5 (1977) provides in pertinent part as follows:

> (a) When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.
>
> (b) The Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

nation that (1) the standards of performance do not apply to boilers which, like those at PPG's Lake Charles works, derive a substantial amount of heat from turbine exhaust gases (waste heat) and (2) that construction of PPG's new power plant was commenced prior to August 17, 1971, the date of publication of proposed standards of performance for fossil fuel-fired steam generators. PPG also asked EPA for a clarifying determination as to the application of the Subpart D standards of performance to waste heat boilers if EPA ultimately determined that the standards governed the operation of PPG's boilers.

The Regional Administrator of EPA's Region VI responded to PPG's three requests on June 8, 1977. EPA determined that PPG's waste heat boilers came within the scope of the standards of performance for fossil fuel-fired steam generators because each of the boilers is capable of operating at 250 million British thermal units per hour heat input. The fact that the boilers were designed to manufacture steam through combined use of turbine exhaust gases and the burning of fossil fuel was disregarded. EPA also rejected PPG's argument that construction of the waste boilers should be considered to have commenced before August 17, 1971, at the time that construction commenced on the power plant as a whole.

In response to PPG's request for a determination clarifying application of the performance standards to the waste heat boilers output, EPA ruled that compliance with the standards would be judged only

on the amount of heat and combustion effluents produced by the fossil fuel burned in the waste heat boilers. The turbine generators, having been ordered prior to August 17, 1971, were not subject to federal standards of performance. The combustion effluents and thermal energy from the turbines could therefore be discharged into the atmosphere without being limited by the standards. Reasoning that there would be no logic in penalizing an owner or operator who chooses to use the exhaust heat in a waste heat recovery steam generator unit rather than discharge it into the atmosphere, EPA ruled that both the heat input and the emission contribution of the combustion turbine would be excluded in determining whether the steam generator plant complies with the standards.

The Director of the Division of Stationary Source Enforcement of EPA ultimately upheld these determinations and further ruled that PPG would be required at all times to burn fuel containing a sulfur content equal to or less than a sulfur level to be specified as a result of performance tests conducted in compliance with the performance standards. He further determined that PPG was not required to install equipment for and to conduct the continuous monitoring for sulphur dioxide and nitrogen oxides mandated by the performance standards, but that under the standards PPG would be obliged to install and operate continuous opacity monitors in the stacks of the waste heat boilers and might also be required to monitor and report on the sulfur content of the fossil fuel burned in the boilers.

PPG filed this petition for review. Since PPG challenges this Court's jurisdiction to review EPA's actions in this case, it has also filed, as a precautionary measure, an action for review in the United States District Court for the Western District of Louisiana. *PPG Industries, Inc.* v. *Costle*, No. 77-1271. EPA has moved to stay the district court action pending a determination in this Court of its jurisdiction to hear this petition.

IV. *Jurisdiction*

PPG argues that the district court, rather than the court of appeals, should have jurisdiction of this review. Although disputing this Court's jurisdiction, PPG filed a timely petition for review here as a protective measure while concurrently filing suit in the Western District of Louisiana. No ruling concerning jurisdiction had been made by the district court when this case was argued.

Prior to the passage of the Clean Air Act Amendments of 1977, the district courts and not the courts of appeals had jurisdiction to review determinations of local applications such as the one before us. 28 U.S.C.A. § 1331(a) confers jurisdiction on the federal district courts to review agency action, subject only to preclusion by review statutes created or retained by Congress. *Califano* v. *Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977). The court in *Utah Power & Light* noted that district court jurisdiction has been recognized under section 10 of the Administrative Procedure Act, 5 U.S.C.A. §§ 701-706. 553 F.2d at 219 n.20. The Supreme Court in

Califano v. *Sanders*, however, concluded that the amendment of § 1331 to eliminate the specified jurisdictional amount requirement for a review of agency actions undercuts the rationale for interpreting the Administrative Procedure Act as an independent jurisdictional provision. 430 U.S. at 105, 97 S.Ct. 980, 51 L.Ed.2d 192. The controlling issue, therefore, is whether the 1977 Amendments have changed the law to require that this review should take place initially in the courts of appeals. We conclude that they have not.

The Clean Air Act Amendments of 1977 added new language to § 307(b)(1), the judicial review provision of the Act. The new Act provides exclusive jurisdiction in the courts of appeals to review "any order" issued under several specifically enumerated sections and "any other final action of the Administrator under this Chapter . . . which is locally or regionally applicable." [4] The EPA determinations in-

[4] As amended, § 307(b)(1) provides in pertinent part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before August 7, 1977) or under regulations thereunder, *or any other final action of the Administrator under this chapter* (including any denial or disapproval by the Administrator under subchapter I of this chapter) *which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.

42 U.S.C.A. § 7607(b)(1) (emphasis added).

volved in this case do not fall within any enumerated sections of the statute. They are, rather, the Administrator's interpretations and applications of regulations promulgated pursuant to § 111 of the Act. Therefore they must come under the "any other final action" clause of the statute if the court of appeals is to have jurisdiction. The parties agree the action is locally applicable, so that if there is court of appeals jurisdiction, it is here rather than in the D.C. Circuit.

The addition of the "any other final action" language to the statute distinguishes the District of Columbia Circuit case of *Utah Power & Light Co.* v. *EPA*, 180 U.S.App.D.C. 70, 553 F.d 215 (1977), upon which PPG relies. There the court held that the language of § 307(b)(1) of the 1970 Amendments to the Clean Air Act [5] and "the policy consid-

[5] Section 307(b)(1), 42 U.S.C. § 1857h-5(b)(1), specifies a number of grounds for direct review in the court of appeals:

> A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be

erations underlying that provision compel the conclusion that challenges to the *validity* of certain agency regulations are directly reviewable by courts of appeals, whereas challenges to *interpretations* of those regulations are not." (emphasis added) 180 U.S. App.D.C. at 73, 553 F.2d at 218. The court determined that Utah Power & Light Company was attacking the particular interpretation and application of the regulations to three power plants and not the validity of the regulations themselves.

PPG argues that the phrase "any other final action . . . under this chapter" refers only to the provisions of the Act enumerated in § 307(b)(1). The EPA contends that the phrase should be interpreted literally to subject every agency final action to review by the courts of appeals. Neither argument is convincingly supported in the language of § 307(b)(1) itself. Had Congress intended to confer jurisdiction over only the enumerated sections, the "other final action" clause would be qualified by "under these

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prescribed under section 1857f-1(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title, or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit.

sections" rather than "under this chapter" which clearly refers to the Act as a whole. If Congress intended, however, to cast the entire responsibility for reviewing all EPA action under the Act into the courts of appeals, the numeration of specific sections would appear to be redundant.

The most revealing aspect of the legislative history of the revised § 307(b)(1) is its complete failure to mention what EPA asserts was a massive shift of jurisdiction to the courts of appeals.[6] In a legislative

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[6] Subsection (c) of section 305 of the bill is intended to clarify some questions relating to venue for review of rules or orders under the act. Paragraph (1) of that subsection makes it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia. These would include, to mention but a few examples, regulations to carry out the nonattainment policy referred to in section 117 of this bill and regulations to effectuate motor vehicle assembly-line test provisions of section 206 of the act or inspection/maintenance requirements under section 208 of this bill.

Subsection (c)(2) of section 305 provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State or region is located. This provision applies, except as otherwise provided in paragraph (4), to the Administrator's action in approving or promulgating an implementation plan for any State.

On the other hand, if an action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect beyond a single, judicial circuit), then

report which discusses proposed changes for over 300 pages, such a sweeping revision would be unlikely to escape comment.

The likelihood that such a jurisdictional transfer was contemplated is further reduced by the nature of the "final actions" which this asserted shift would direct to the appellate courts and the state of the accompanying administrative records on which these actions would be reviewed. Many EPA decisions are the end product of agency procedures which produce an administrative record sufficiently complete for

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exclusive venue for review is in the U.S. Court of Appeals for the District of Columbia, under paragraph (4).

In adopting this subsection, the committee was in large measure approving the portion of the Administrative Conference of the United States recommendation section 305.76-4(A), that deals with venue.[10] The committee's view also concurs, however, with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick, which accompanied the Administrative Conference's views.[11]

Also, as indicated earlier, the committee bill incorporates recommendation D2 of the Administrative Conference on extending the period for petitioning for judicial review in the court of appeals.

However, in no event should these provisions be construed as endorsement of the remainder of the Administrative Conference's recommendations. Some of these recommendations, such as those contained in items B and C, were simply not considered by the committee. Others (such as the recommendations in D1 and D3, were rejected.[12]

H.R. Rep. No. 294, 95th Cong., 1st Sess. ——, 323-24 *reprinted in* [1977] U.S. Code Cong. & Admin. News pp. 1077, 1402-03. The recommendations of the Administrative Conference are reprinted in C.F.R. § 305.76-4.

judicial review of the decision.[7] Others, like those challenged by PPG here, are determinations made during the course of the agency's operations as to how its regulations will be interpreted and applied. If such decisions could be made only after agency compilation of a thorough record, the agency's administration of the Act would be brought to a standstill. *Cf. Save the Bay, Inc.*, v. *Administrator of E. P. A.*, 556 F.2d 1282, 1292 (5th Cir. 1977). The skeletal record of the Administrator's grounds for such a decision, however, here a collection of correspondence between the agency and affected parties, may leave the reviewing court unable to verify the Administrator's grounds or, perhaps, to identify those grounds at all. *See, e.g., Save the Bay, Inc.*, 556 F.2d at

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[7] For example, the actions and standards made reviewable under the former § 307(b)(1) would have produced such records. Senator Cooper, endorsing unified review in the Courts of Appeals rather than jurisdiction shared with the district courts, explained:

> I prefer the judicial review framework in the bill for I believe that through the administrative process the Secretary can develop on the record all of the technical and other relevant information necessary to achieve a sound judgment. Similarly, and in accordance with general administrative law, such decision of the Secretary, should be reviewable in the court of appeals so that the interests of all parties can be fully protected. With the record developed by the Secretary, the court, as an unbiased, independent institution, is the appropriate forum for reviewing such decision and making a judgment as to its quality.

Senate Comm. on Public Works, 93rd Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970 (Comm. Print 1974) at 386.

1292. (Record failed to reveal what factors caused EPA to refrain from exercising its veto power against a permit to discharge pollutants under the Federal Water Pollution Control Act).

The Administrator's decisions in this case would have to be reviewed under the standard supplied by the Administrative Procedure Act, 5 U.S.C.A. § 706. The Court must inquire (1) whether the action was within the scope of the agency's authority, (2) whether the agency conformed to procedural requirements, and (3) whether the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Texas* v. *EPA*, 499 F.2d 289, 296 (5th Cir. 1974), *cert. denied*, 427 U.S. 905, 96 S.Ct. 3191, 49 L.Ed.2d 1199 (1976). The third inquiry requires that the Court consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971). The Supreme Court in *Overton Park* remanded the case to the district court for review of the Secretary of Transportation's approval of highway construction through the city park and observed

> [S]ince the bare record may not disclose the factors that were considered or the Secretary's construction of the evidence it may be necessary for the District Court to require some explanation in order to determine if . . . the Secretary's action was justifiable under the applicable standard.

> The court may require the administrative officials who participated in the decision to give testimony explaining their action. . . . [H]ere there are no . . . formal findings and it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves.

401 U.S. at 420, 91 S.Ct. at 825.

This Court has noted

> When Congress has vested this court with original review, it generally has done so in relation to an administrative process that more easily lends itself to production of a reviewable record.

Save the Bay, Inc., 556 F.2d at 1292. It is apparent that appellate courts, lacking the fact-finding mechanisms available to district courts, are ill-suited to conduct meaningful review of administrative actions resting on records as sparse as the one here.

Judge Clark has previously articulated the adverse effects flowing from the legislative mandate that judicial review proceedings of highly technical, factually complex administrative actions be initially injected into the court system at the appellate level. *See Texas* v. *EPA*, 499 F.2d 289, 321 (5th Cir. 1974) (Clark, J., concurring), *cert. denied*, 427 U.S. 905, 96 S.Ct. 3191, 49 L.Ed.2d 1199 (1976).

> No formal hearing has ever been held in this highly technical, factually complex matter. The administrative "record" upon which we had to base our review was comprised of only the sparest of documentation, for it essentially evolved

from an act of agency rule-making. To accentuate the problem the agency contracted the services of a private firm for the formulation of most of the rule requirements it ultimately adopted here, so that not even intra-agency background for these actions was available. The writing judge was required to hold both pre and post-argument conferences with counsel for the parties to enable the three of us as a court to comprehend the substance of the issues and conduct a minimally meaningful review.

The subject matter of this action involves the health and welfare of millions of citizens, the continued business vitality of tens of thousands of firms and compliance expenditures costing billions of dollars.

These extensive rights deserve a more orderly process of judicial reflection.

499 F.2d at 321-322.

The discovery apparatus of district courts permits the fact and record development prior to court confrontation. At this level, only after hearing, which may be long delayed because of other calendar commitments, can it be known whether the record is sufficient for review purposes. An insufficient record may necessitate a remand for fact-finding and record completion and a second court appearance, often before other judges, long delayed.

Whatever addition to the jurisdiction of the courts of appeals Congress may have contemplated by adding the "any other final action" language to § 307 (b) (1), we assume that section was drafted with

the mechanical limitations of the courts of appeals in mind. In light of the difficulty of review in this Court of the agency action challenged by PPG, we will not hold that review was intended to be here in absence of explicit congressional direction. The petition for review is therefore dismissed.

PETITION DISMISSED.

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ Brenda Hauck
BRENDA HAUCK

Deputy, Mar. 6, 1979

New Orleans, Louisiana

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

No. 77-2989

PPG INDUSTRIES, INC., PETITIONER,

versus

ADLENE HARRISON, REGIONAL ADMINISTRATOR, AND DOUGLAS M. COSTLE, ADMINISTRATOR OF ENVIRONMENTAL PROTECTION AGENCY, RESPONDENTS.

Petition for Review of an Order of the Environmental Protection Agency

Before RONEY, TJOFLAT AND HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of PPG Industries, Inc., for review of an order of the Environmental Protection Agency, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the petition for review of an order of the Environmental Protection Agency in this cause be, and the same is hereby, denied;

It is further ordered that the petitioner pay to the respondent the costs on appeal, to be taxed by the Clerk of this Court.

January 8, 1979

By /s/ Brenda Hauck
Deputy

Issued As Mandate: Mar 6 1979

APPENDIX C

OCT. 5, 1976

CERTIFIED MAIL—RETURN RECEIPT
REQUESTED #819271

Mr. T. G. Taylor
Technical Manager
PPG Industries, Inc.
P. O. Box 1000
Lake Charles, Louisiana 70601

Dear Mr. Taylor:

Your letter and attachments of June 28, 1976 have been received and reviewed. Based on the information in that letter and your earlier submittal of May 14, 1976, we have determined that the Standards of Performance for New Stationary Sources [40 C.F.R. Part 60] apply only to the two waste heat steam generators of Powerhouse C located at the Lake Charles, Louisiana plant.

The applicability of the New Source Performance Standards (NSPS) is determined solely by the facts applicable to the specific facilities for which NSPS regulations have been issued. It is not considered relevant for NSPS purposes that the gas turbines for Powerhouse C were ordered in 1970. The purchase order you submitted on the waste heat steam generator showed that the unit was ordered on October 14, 1974. Because the contractual obligation to construct the steam generators was after the date of the proposed regulations for fossil fuel fired steam genera-

tors, August 17, 1971, the waste heat steam generators numbered 1 and 2 of Powerhouse C are subject to the provisions of the Standards of Performance for Fossil Fuel Fired Steam Generators, 40 C.F.R. Part 60, Subpart D (a copy of which is enclosed).

The two waste heat steam generators are subject to the notification and recordkeeping requirements of 40 C.F.R. 60.7 and the performance tests requirements of 40 C.F.R. 60.8 (copies of which are enclosed).

If you have any questions concerning this matter, you may contact Mr. Gary Bernath of my staff by letter or by telephone at (214) 749-7675.
Sincerely yours,

ORIGINAL SIGNED BY

O. W. Lively
Acting Director
Enforcement Division (6AE)

Enclosure a/s

cc: Mr. James Coerver
Technical Secretary
Louisiana Air Control Commission
P. O. Box 60603
New Orleans, Louisiana 70160
bcc: DSSE, Washington, D.C.

6AEL:JVeach:ma:X2142:9-30-76

6AEL	6AEA	6AEA	6AEA
Collins	Bernath	Fahrenthold	Doyle

APPENDIX D

Dec. 29, 1976

cc: Mr. James Coerver
Technical Secretary
Louisiana Air Control
Commission

Mr. T. G. Taylor
Technical Manager
PPG Industries, Inc.
P. O. Box 1000
Lake Charles, Louisiana 70601

Dear Mr. Taylor:

We have reviewed your letter of November 12, 1976 concerning the two steam generators of Powerhouse C.

As we stated in our letter of October 5, 1976, the applicability of the New Source Performance Standards (NSPS) depends solely on the facts relating to the types of equipment for which NSPS regulations have been issued. The regulations apply to a facility the construction or modification of which is commenced after the date of publication of any standard (or, if earlier, the date of publication of any proposed standard) applicable to that facility. The information you have provided shows that the commencement of the construction of the two steam generators was after the publication of the proposed regulation for fossil fuel fired steam generators. Even though you may have ordered equipment before

the date of the proposed regulations that would be completely useless without the steam generators, that action is irrelevant to determine the applicability of the regulations to the two steam generators.

We hope that this discussion makes it clear why the two steam generators are subject to the provisions of the Standards of Performance for New Stationary Sources, 40 CFR Part 60.

If you still desire to have a meeting discussing this determination, please contact Mr. James Veach of my staff by letter or by telephone at (214) 749-2142.

Sincerely yours,

ORIGINAL SIGNED BY

O. W. Lively
Acting Director
Enforcement Division

6AEL:JVeach:ma:X2142:1-26-76:

Retyped:12-6-76

6AEL	6AEA	6ARA
Collins	Bernath	Fahrenthold

APPENDIX E

PPG INDUSTRIES, INC./
ONE GATEWAY CENTER/
PITTSBURGH, PENNSYLVANIA 15222/
AREA 412/434-2145

GEORGE P. CHENEY, JR., Assistant Counsel

April 13, 1977

Mr. Howard Bergman
Director, Enforcement Division
Environmental Protection Agency
Region VI
1600 Patterson Street
Dallas, Texas 75201

Re: *Request for Determinations under 40 C.F.R. § 60.5.*

Dear Mr. Bergman:

By this letter, PPG Industries, Incorporated, ("PPG"), seeks a determination that construction of two "waste heat" boilers, components of "Power Plant C" at PPG's Lake Charles, Louisiana works ("Lake Charles works") was "commenced" within the meaning of Section 111(a)(2) of the Clean Air Act, as amended, 42 U.S.C. § 1857c-6, prior to August 17, 1971, the date of proposed "new source" emission regulations for fossil-fuel fired steam generators. Alternatively, PPG seeks a determination that the regulations for fossil-fuel fired steam generators do not apply to waste heat boilers such as those being installed at the Lake Charles works. This request for

determinations is submitted pursuant to 40 C.F.R. § 60.5 (captioned "Determination of construction or modification").

Power Plant C is a fully coordinated power generating system, composed of two gas turbine generators (producing electricity) and two "waste heat" boilers (producing process steam). The first of the gas turbines will begin operation by the end of April of this year, and the companion "waste heat" boiler is projected to go on line in June. The second set of such units (turbine plus "waste heat" boiler) is scheduled for start-up in the third quarter of 1978. The determinations sought by PPG are essential to clarify tentative findings contained in a letter from Mr. O. W. Lively, Acting Director, Enforcement Division, Region VI, dated October 5, 1976, which findings have been the subject of continuing subsequent correspondence and discussion.

Should it be determined both that construction of the "waste heat" boilers of Power Plant C was not "commenced" until after August 17, 1971, and that the new source regulations for fossil-fuel fired steam generators apply to such "waste heat" boilers, PPG by this letter seeks an interpretation of the regulations as applied to the "waste heat" boilers. Because of the manner in which the standards of performance are written (explicit formulas set out allowable emissions where specified fuels are used), they cannot be readily applied to the "waste heat" boilers. The regulations would in some way have to be adapted to take into account the fact that only part of the

heat used is created by the firing of fuel within the boilers themselves.

To aid in your consideration of this request, two memoranda are appended. Appendix A is a statement of the facts relevant to the determinations sought by PPG. Appendix B is a memorandum prepared by counsel based on those facts analyzing the relevant provisions of the Clean Air Act and implementing regulations.

The long and short of the matter is that the present regulations for steam generators seem to have been construed to prevent, or at least to tend to prevent, the possibility of "recapturing" waste heat, a very desirable goal, from both an energy conservation and economic standpoint. On the other hand, if the turbines were operated independently of the boilers, i.e., if no attempt were made to use the waste heat from the turbine exhaust in the boilers, full compliance with the EPA standards of performance could be achieved. This anomaly is especially troubling to PPG since the design of and course of construction for the combined turbine-"waste heat" boiler units was set in 1970, well before the advent of the standards of performance.

Very truly yours,

/s/ George P. Cheney, Jr.
GEORGE P. CHENEY, JR.
Assistant Counsel

cmr

Attachments

cc: Edward E. Reich

Director, Division of Stationary
Source Enforcement
Environmental Protection Agency
401 M Street, S. W.
Washington, D. C. 20460

APPENDIX F

ENVIRONMENTAL PROTECTION AGENCY

JUN 8 1977

CERTIFIED MAIL—RETURN RECEIPT
REQUESTED #560100

Mr. George P. Cheney, Jr.
Assistant Counsel
PPG Industries, Inc.
One Gateway Center
Pittsburgh, Pennsylvania 15222

Dear Mr. Cheney:

We have reviewed your letter of April 13, 1977, and the memoranda attached thereto, concerning the two "waste heat" boilers of "Power Plant C" at PPG's Lake Charles, Louisiana plant. We considered your letter as a request for reconsideration of the determination given in our letter of October 5, 1976. After consulting with the Division of Stationary Source Enforcement, we reaffirm our prior determination that the two "waste heat" boilers are subject to provisions of Standards of Performance for Fossil Fuel Fired Steam Generators, 40 CFR, Part 60, Subpart D.

As stated in our letter of December 22, 1976, to PPG, the determination of when a facility (subject to a Standard of Performance) commenced construction depends solely on the construction of that facility. Therefore, we cannot favorably consider your request that the commencement of construction of

two "waste heat" boilers be tied to the construction of the entire Power Plant C.

The two boilers each have the capability of operating at more than 250 million British thermal units per hour heat input. For this reason the boilers come within the scope of the Standards of Performance for fossil fuel fired steam generating units even though the boilers can burn a combination of fuel and turbine exhaust gases.

As to the question of how to determine compliance, on April 17, 1972, the Office of Enforcement ruled, in a similar case that:

> The combustion turbine facility clearly is not subject to the present Federal regulations, and both the combustion effluent and thermal energy from the turbine may be discharged to the atmosphere without being limited by the standards. There would be no logic, then in penalizing an owner or operator who chooses to use the exhaust heat, which otherwise would be wasted, in a waste heat recovery steam generator unit, with or without supplemental fuel.
>
> Accordingly, we agree that both the heat input and the emission contribution of the combustion turbine will be excluded in determining whether the steam generator plant complies with the standards. Compliance will be judged only on the amount of heat and combusion effluents added by supplemental fuel used in the waste heat recovery steam generator, which is the affected facility.

Therefore, it is necessary for the performance tests to be conducted on 100% fossil fuel.

If you have any additional questions on this matter, please contact Mr. James Veach at (214) 749-2142.

Sincerely yours,

/s/ J. Paul Camola for
John E. White
Regional Administrator

bcc: Larsen, DSSE
Knudson (6S&A)

6AEL:JVeach:ma:X2142:5-23-77

APPENDIX G

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
WASHINGTON, D.C. 20460

August 18, 1977

OFFICE OF ENFORCEMENT

Mr. Charles F. Lettow
Cleary, Gottlieb, Steen and Hamilton
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Dear Mr. Lettow:

A re-examination of our August 3, 1977, letter to you concerning PPG's Lake Charles, Louisiana, waste-heat boilers reveals a misstatement of the applicable regulatory requirements affecting the PPG facility. On August 8, 1977, a member of my staff, Douglas Farnsworth, telephoned Mr. Douglas Kliever, of your firm, to notify him of the possible re-determination.

Our August 3, 1977, letter stated that your understanding was correct

> that except for the time of the performance test or other periods when a boiler is operating on 100 percent fossil fuel, the standards for fossil fuel-fired boilers would not apply to the operation of PPG's waste-heat boilers in their planned mode of operation (significant heat input from turbine exhaust gas) . . . .

That statement is not consistent with previous EPA determinations in similar cases, nor is it consistent with EPA Region VI's June 8, 1977, determination letter to Mr. George P. Cheney, Jr. of PPG. It is correct that during a performance test the boiler must operate at 100 percent fossil fuel. However, subsequent to the performance test, compliance will be judged on the amount of heat and emissions attributed to the fossil fuel used in the waste heat boiler. Thus, the standards of performance for a fossil fuel-fired steam generator will apply to the PPG facility at all other times after the performance test as well. However, compliance with the standard will be determined based on the heat input from the fossil fuel and the emissions directly related to the combustion of that fossil fuel. Any heat input or emissions caused by the waste-heat will be disregarded in determining compliance.

As stated in 40 CFR § 60.11(a), compliance with standards shall be determined only by performance tests established by 40 CFR § 60.8. However, sources subject to new source performance standards are required, pursuant to 40 CFR § 60.11(d), "to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions." Since PPG has chosen low sulfur fuel as the method for meeting the standard, the regulations require burning such fuel at all times subsequent to the performance test.

As was indicated to you during your August 17, 1977, telephone conversation with Doug Farnsworth and Rich Biondi of my staff, in-stack continuous monitors for NO_x and SO_2 will not have to be installed on the PPG facility. However, an opacity

monitor must be installed and operational prior to conducting performance tests (40 CFR 60.13(b)). In addition, PPG will be required to perform some form of alternative monitoring. This may include monitoring and reporting on the sulfur content of the fossil fuel burned in the boiler. PPG should contact our Region VI office in Dallas, Texas, to determine the specifics of the alternative monitoring requirements, as well as the opacity monitor.

The second point made in the August 3, 1977, letter which confirmed that PPG's Lake Charles, Louisiana, facility would not be subject to any new source performance standard for waste-heat boilers which might be proposed and promulgated in the future, is accurate in that a standard more stringent than the present one would not be applicable to the PPG facility.

I apologize for the incorrect statement made in our earlier letter. However, the position taken above is consistent with Region VI's original June 8, 1977, determination to PPG. If you have any questions on this matter, please contact Douglas Farnsworth of my staff at (202) 755-2570.

Sincerely yours,

/s/ Edward E. Reich
EDWARD E. REICH, Director
Division of Stationary
Source Enforcement

cc: Director, Enforcement Division
Region VI

Jack Farmer, SDB

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